No. 12331.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES I. ROSIN,

Appellant,

vs.

J. P. HART, Trustee in Bankruptcy of the Estate of INTERNATIONAL MINING & MILLING CO., debtor, and SECURITIES AND EXCHANGE COMMISSION,

Appellees.

OPENING BRIEF OF APPELLANT.

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Statement of Jurisdiction.

This is an appeal from an Order made by the United States District Court for the District of Nevada, disallowing attorney fees to appellant who appeared as attorney for Trustee in a California Superior Court proceeding, which was superseded by this action in the United States District Court for reorganization of a corporation under Chapter X of the Bankruptcy Act. Appellant here appears in *propria persona* as the attorney who represented the said State Trustees in the Superior Court of California. That upon the filing of Petition for Reorganization of the corporations in the United States District Court under Chapter X of the Bankruptcy Act of the United States, as amended, the said United States District Court obtained jurisdiction of this action.

Reference is here made to the following pleadings:

Petitions for Relief under Chapter X of the Bankruptcy Act and Orders made thereon.

Petition for Appellant for Attorney Fees.

Findings of Fact, Conclusions of Law and Orders thereon.

All of the above are contained in Volume I of the record on appeal, the latter two being part of the printed Appendix.

Volume II of the record on appeal is the transcript of testimony on behalf of appellant's petition, given in the United States District Court.

The United States District Court had jurisdiction of this proceeding and of the matter of allowance of compensation to attorneys in this and in prior proceedings and of the Petition filed by petitioner for compensation as attorney for Trustee in the prior proceeding and in this proceeding and this Honorable Court has jurisdiction of the appeal of this petitioner.

Article XIII and Article XIV of the Bankruptcy Act as amended, including Sections 241 to 259, inclusive, covers the subject matter of jurisdiction of the trial court to entertain petitions for allowance of compensation to attorneys in the proceeding under the Bankruptcy Act and in prior proceedings, and particularly Sections 241, 242 and 243, of Article XIII, and Section 258 of Article XIV, which makes provision for compensation for services rendered in a prior proceeding. Section 250 of Article XIII provides for the taking of appeals in matters of law and fact from orders making or refusing to make allowances of compensation and allows the taking of appeals independently of other appeals in the said proceeding.

Statement of the Case.

In May of 1938 there was pending in the Superior Court of the State of California in and for the County of Mariposa, an action numbered 1646 and entitled *Andrew M. Logie v. Mount Gaines Mining Company, et al.* There were at that time two groups of persons attempting to direct the affairs of the corporations in question, to wit: the Mount Gaines Mining Co. and the International Mining and Milling Company. One of these groups was directed by Charles F. Humphrey, a lessor of the mining property in question, and the interests of the plaintiffs in the action were with the Humphrey group. The action against the defendants was directed against A. G. Ilseng, who was the president of the corporation, the organizer thereof, and the largest stockholder. At the time the suit was commenced, A. G. Ilseng and a Board of Directors supporting him, were in charge of the affairs of the corporations. That during the pendency of the suit, the affairs of the corporations had been taken over by, and on May 9, 1938, at the time the Order of the Court was made appointing the Trustees, charge of the affairs of the corporations was, in the hands of the Humphrey group, represented by the plaintiff in the said action. By reason of the opposition of the two groups and the jeopardy of the affairs of the corporations resulting therefrom, the Court on May 9, 1938, relieved Charles F. Humphrey and his group from the management of the affairs of the corporation and placed the same in the hands of three Trustees, C. B. Buxton, H. K. Trask, and A. V. Udell. (The only survivor is C. B. Buxton, the other two being deceased.) The International Mining and Milling Company was at all times a mere holding company, holding the stock of

the Mount Gaines Mining Company, and the Mt. Gaines Mining Co. was the corporation actively engaged in mining operations under a lease held by the corporation from the mine owners, Charles F. Humphrey and others.

On May 9, 1938, Judge J. J. Trabucco, of the Superior Court of the State of California, in and for the County of Mariposa, made the order appointing the three Trustees, who immediately took charge of the affairs of the corporations. Within a few weeks thereafter, the Trustees employed the appellant as their attorney, to act for them in all matters pertaining to the trusteeship. During the period of the trusteeship the Humphrey group was active in making efforts to cancel out the lease held by the Mt. Gaines Mining Co., to obtain a discharge of the Trustees and have the management of the property revert to them, and when not successful in this, encouraged claimants to file suits against the corporation, have officers of the Humphrey Board of Directors served with process and permit default to be taken, so that judgment, liens, and executions may be filed against the corporations. Appellant, on each of these occasions, took steps to restrain Charles Humphrey and his group from proceeding and successfully prevented him from carrying out any of these plans. During the pendency of the trusteeship, the Trustees discovered that Charles Humphrey, during the time he was in charge of the affairs of the corporations, expended substantial sums of money for attorney fees, items of expense and other charges in his effort to maintain a hold and grip upon the affairs of the companies, and had charged all these items to the corporations. Appellant worked on these accounts with the Trustees, and the Trustees finally instructed appellant to file suit for the

recovery of the money and complaint was prepared by appellant and filed, but was later withdrawn upon advice of Judge Trabucco, who suggested that it would not be advisable at that time to entail the expense of litigation. During the pendency of the State Trusteeship, an action was filed by one Gustavason, one of the landowners, in the nature of a quiet title against the Mt. Gaines Mining Company. That no complaint was served on the Trustees, and appellant has no knowledge as to whether same was served on the Humphrey group of directors or officers. When the matter of this complaint came to the attention of appellant, he prepared an answer and cross-complaint, and served the same on the plaintiff, but before the original copies were filed in court, the action was dismissed by the plaintiff.

During the trusteeship, which continued for approximately a year, the appellant's office was the office of the Trustees, and all the business affairs of the corporation on behalf of the Trustees, excepting the operation office maintained at the mine itself, was handled by the appellant. That upon the filing of the petition in the United States District Court in the Reorganization Proceedings, under Chapter X, on June 30, 1939, and upon the Order of the Court entertaining the petitions, the affairs of the corporations were turned over to the United States District Court Trustee, who handled the affairs of the corporations for a period of approximately ten years, and that within the past several months the said Court entertained a petition to put the said corporations in bankruptcy, and they were so adjudicated.

That appellant's petition, at the time of hearing, was one of approximately seventeen petitions for compensation

for hearing on which the Court allowed two days by reason of congestion of his calendar, and appellant, and his witness, consumed about half of that time in introducing his evidence. No evidence was introduced against appellant's petition.

At the outset of the hearing on petitions for compensation, when the same were heard, a statement was read by Mr. Tucker, attorney for the Securities and Exchange Commission, to which all attorneys agreed and consented, and which was approved by the Court, by which all allegations in all of the petitions of all of the claimants and petitioners for compensation for services were agreed to be considered as if testified to and evidence on behalf of petitioners. This is in conformity with a typewritten statement previously distributed by Mr. Tucker, attorney for the Securities and Exchange Commission, to all of the attorneys making claims for compensation, and is in approximately the same language. The allegation of appellant's petition was therefore considered as evidence on his behalf. No written pleadings or affidavits refuting appellant's allegations of his petition were ever filed, and no testimony or evidence was introduced at the hearing in an effort to disprove the allegations of the petition or the testimony as given by appellant on the witness stand.

Approximately half a year before the petitions in the United States District Court were filed, the California Superior Court at Mariposa made an interim allowance to appellant as attorney for the Trustees in the amount of $500. In the Findings of the District Court, it is stated

that the $500 allowed was for the appearance of Oct. 3rd, 1938. As to all other services rendered including numerous matters on which appellant appeared in Court from Oct. 3rd, 1938 to June 30, 1939, the Court denies any allowance for the reason that "No direct benefit resulted to the estate." The Court does not indicate the differentiation in the direct benefit to the estate between the one appearance on Oct. 3rd, 1938 and all other later appearances. The Court has arbitrarily applied the $500 allowance to the Oct. 3 appearance. It is difficult to find the distinction wherein the appearance of Oct. 3 on an order to show cause why certain persons should not be restrained from action to cancel the lease, is a matter of direct benefit to the estate and why none of the following instances of proceedings brought and proceedings defended and appearances thereon, are of benefit to the estate:

Bringing Order to show cause against *de facto* officers of the corporations, why they should not inform the Trustees of process served upon them so that Trustees may defend proceedings thereon, where the said *de facto* officers had been in collusion with creditors and others to have judgments and execuitons levied against the corporations by service of process on them.

Extended research and preparation of answer and cross-complaint on action against the corporations to quiet title to the lease under which the corporations operated.

Negotiations and conferences resulting in compromise of undisputed claims against the corporations at

a saving of approximately $2,000, and obtaining an order of Court approving said compromises.

Successfully resisting motions to dismiss the proceeding in which the Trustees were appointed. Order of June 1947.

Preparation of action for accounting against one of the lessors of the property operated by the corporations, the data and information for which was later used in accounting action for the benefit of the District Court Trustee.

Preparation of current account of the Trustees and obtaining approval of Court thereon.

Appearance before the Superior Court at San Francisco to resist suits on claims filed by collaborators of the *de facto* officers of the corporations and on which process had only been served on such *de facto* officers.

Appearing in Court and successfully resisting motion to discharge the Trustees.—Order of Mar. 20, 1939.

Appearance in Court and successfully resisting motion to vacate appointment of Trustees.—Order of June 5, 1939.

Appearance in Court on Order to show Cause by Reimer and Edwards why their claims should not be allowed. (Note: These matters after argument were not acted upon, but are the claims on which later service of process was later collusively made on *de facto* officers on action filed in San Francisco, and on which appellant appeared at time of trial in San Francisco above referred to.

Specification of Error.

I. That the Order of the Court based on the Conclusion that the appellant's services did not confer upon the estate of the debtor any direct, substantial and demonstrable benefit, is not supported by, and contrary to the evidence.

II. That whereas appellant's petition for compensation should be acted upon under the provisions of Section 258 of the Bankruptcy Act, the Court has failed to consider the petition under the law applicable thereto, and has erroneously based its Order on other provisions of the law pertaining to attorneys acting in different capacities than that of appellant.

III. The Order of the Court based on the holding that appellant had no authority to represent the State Trustees in the United States District Court, is not supported by the evidence, contrary thereto and contrary to the Court's own Finding [Finding XXVIII], is based on an erroneous premise of law, and that the said Finding XXVIII on which the Order is made, is inconsistent in itself and with other findings.

IV. That the Order of the Court disallowing fees to appellant is not supported by the evidence, contrary to law, is an order arbitrarily made without regard to law or evidence, and the petition is not judged by the same standards as applied to petitions for fees by other petitioners.

V. That the Findings of Fact are inconsistent in themselves, indefinite and speculative.

VI. That the Findings of Fact are not supported by the evidence.

POINT I.

The Order of the Court Based on the Conclusion That the Services of Appellant Did Not Confer Upon the Estate of the Debtors Any Direct, Substantial and Demonstrable Benefit Is Not Supported by the Evidence.

The Findings pertaining to appellant's petition are contained in paragraphs XX to XXX inclusive [App. pp. 47 to 51, Incl.] Finding XXV [App. p. 49] reads as follows:

> "The Court does not find that any of the other services described in the applicant's petition for compensation performed prior to June 30, 1939, conferred upon the estates of the debtors in reorganization any direct, substantial and demonstrable benefit."

These services covered the major portion of a year where the office of appellant handled most of the business of the Trustees and was their only office and in which matters appellant was engaged, devoting a large share of his time thereto besides carrying the office expense of the Trustee's business as part of his services. In addition to this he brought numerous proceedings and defended many on behalf of the trustees and made a considerable number of appearances in Court in connection therewith.

In this proceeding, there being no pleading denying the matters stated in appellant's petition, and no evidence introduced disputing the same, and the Court not finding that the services were not rendered as stated, but merely that no direct benefit resulted to the estate, it must be presumed that the Court in its finding assumed that the services had been rendered. That being the case, the question to be determined is whether the conclusion of the Court that such services brought no direct benefit to the estate, is supported by the evidence.

Excluding the services rendered by appellant from May 1938 to September 2, 1938, during which period of time

the Court finds that appellant was not employed by the trustees, the following enumeration of services speaks for itself as to whether the services were of direct benefit to the corporations.

Appellant's petition [App. pp. 11 and 12], and testified to as shown in Reporter's Transcript of Appellant's testimony [Vol. II of the Record on Appeal], page 13, line 17, to page 15, line 19; page 25, lines 12 to 19, and page 27, lines 3 to 15. This refers to actions which were commenced against the corporations and in which the Trustees were not served, but in which the Humphrey group of directors were served, and in which appellant obtained an order from Court for the said directors to notify Trustees of such process to avoid judgments being rendered against corporations without knowledge of Trustees. This included the investigation and conferences and affidavits procured and made, wherein it was discovered that Humphrey was negotiating with the plaintiffs on Knowles' claim to have judgment rendered against the corporations, and wherein Humphrey was negotiating to buy the Atlas Powder Co. claim so that he may use it to levy against the corporations, and the order made by the Court upon presentation of these facts.

[Rep. Tr. of Appellant's testimony, p. 15, line 22, to p. 20, line 13]: With reference to conferences, research and preparation of a 13 page answer and cross-complaint [Ex. 9, Vol. I of Record] by appellant in reply to a 22 page complaint by Gustaveson [Ex. 10, Vol. I of Record] in an action filed by him in Mariposa County against the corporations. This is set out in appellant's petition [App. p. 15].

[Rep. Tr. of Appellant's testimony, p. 22, line 7, to p. 27, line 15]: Setting out the many conferences with

Trustees and with claimants regarding settlement of undisputed claims and final settlement at a saving of approximately $2,000 and obtaining order of Court approving same [Vol. I, Ex. 11]. This is set out in appellant's petition [App. pp. 16 and 17.]

[Rep. Tr. p. 27, line 16, to p. 28, line 8]: This is regarding motion made by the Humphrey group to vacate the order appointing the trustees, which appellant successfully resisted and on which after hearing in Court the motion was denied [App. p. 11].

[Rep. Tr. of Appellant's testimony, p. 37, line 7, to p. 38, line 2]: Page 38, line 2 states, "The Court later granted the motion," this is a stenographic error, it should read "The Court later denied the motion." (Respondents, we do not believe will dispute the fact.) This relates to preparation by appellant on resisting motion in June 1947 to vacate and discharge the State Trustees, and to dismiss Superior Court action 1646. This is referred to in appellant's petition [App. p. 14].

As shown by the record this matter took many days of research by reason of the fact that according to the reading of the California statute the movents were entitled to a dismissal as a matter of right by reason of the lapse of more than five years without the action coming to trial. The law as found on research however developed this instance as an exception to the rule. The matter included travel to Mariposa, arguing the motion and travel returning to Los Angeles. According to the Findings this is included in the alleged services which brought no direct benefit to the estate. However, on application of F. E. Braucht for services in the same matter, who (unknown to appellant) was employed by the trustee in this proceeding, the Court found the resistance of the motion by

Braucht, of service to the estate [though he took no part in argument before the Court—Rep. Tr. p. 38, lines 5 to 11], and he was ordered an allowance therefore [Findings XVII to XIX; App. pp. 46 and 47].

[Rep. Tr. p. 46, line 6, to p. 47, line 12]: This is in reference to time spent in preparing an action for accounting against Humphrey which was filed on Order of Judge Trabucco, but which order was later vacated and action ordered dismissed by the Court for the reason as therein stated that the Court did not desire to burden the estate with the cost of litigation [Ex. 15, Vol. I of Record], and the data compiled for this accounting by appellant was used by the respondent Trustee herein in a stockholder's suit against Humphrey [Appellant's Pet., App. p. 15, and Rep. Tr. p. 47, line 26, to p. 48, line 5], and for which services in said action, compensation was allowed to the attorneys appearing therein [Finding LXXIIb and LXX1Xh; App. pp. 69 and 75], though no recovery was made.

[Rep. Tr. p. 51, line 18, to p. 52, line 7]: With regard to accounting for trustees prepared by appellant with the aid only of the bookkeeper at the mine with whom appellant spent two days, and which account was filed and approved by the Court. This is referred to in appellant's petition [App. p. 13].

[Rep. Tr. p. 34, line 24, to p. 37, line 6]: This is in reference to two actions filed by Reimer and Edwards respectively, against the corporations and in which the trustees had never been notified but the Humphrey group of officers had been served, and of which appellant learned on the Friday before the Monday the trial was set for in San Francisco, and on which appellant immediately left for San Francisco to resist the actions in the Superior Court, being away from the office for several days. The

reference to this in appellant's petition is Appendix, page 12.

[Rep. Tr. p. 48, line 24, to p. 49, line 12, and p. 42, lines 1 to 13]: Setting out the interviews with and appearances before Judge Schottky, the Judge in the matter in which appellant appeared for the Trustees and the appearances before him during the year 1939. The reference to this in appellant's petition is Appendix, page 18.

[Rep. Tr. p. 20, lines 9 to 13; p. 50, lines 12 to 16; p. 70, line 24, to p. 71, line 11; p. 73, lines 9 to 24; p. 74, lines 13 to 17]: This sets out the work out of Court performed by appellant and the devotion of a large part of his office time and facilities of his office to the business of the estate, and that this out of Court and office service consumed considerably more time than matters of litigation and was the only office of the trustee. Reference to this service is made in appellant's petition [App. p. 7].

Finding XXV [App. p. 49] to the effect that no direct benefit resulted from these services, is more of a conclusion than a finding. The finding by inference at least, being that the services were performed, the Order of the Court denying compensation on the ground that no direct benefit accrued, cannot be justified except as an arbitrary determination without any regard to the evidence. Appellant hesitates to refer to a Court's ruling or Order as arbitrary, but we cannot see how any other conclusion can be reached where the nature of the services is so evident and where the direct benefit to the estate so apparent, and where the direct benefit to the estate was not questioned in the making of allowances to other counsel, some of which represented interests other than those acting as an arm of the Court.

By Finding XXIII, XXV and XVI it is quite clear that the Court found that the $500 previously allowed was

in compensation for only one proceeding in which appellant appeared in Court, between September 2, and October 3, 1938. This makes it quite definite that none of the other services rendered above set out, which do not include said proceeding were compensated for or allowance made thereon. If Respondent contends that the services were of no direct benefit, may we inquire of him here if the procedure that he, as a Trustee, would have followed would have been to stand by and not oppose the move to terminate the trusteeship, to discharge trustees, to permit collusive judgments and liens to be entered against the corporations, to do nothing about an action pending to quiet title to the company's lease, whether served with process or not, knowing of the collusive conduct of those who might have been served, would he have done nothing and content himself to remain in ignorance of actions filed while service is made on *de facto* officers who plot to put the corporation into financial difficulties; would he have failed and refused to take advantage of settling undisputed accounts at a saving of approximately $2,000, would he have failed to file current accounts of trustees, would he have conducted his trusteeship on guesswork as to his legal rights and refused to obtain the advice and aid of legal counsel.

In further reference to the services rendered by appellant as attorney for the trustees, the record in the said action and in this proceeding shows that upon the State Trustees assuming office and appointment of appellant as their attorney, the charges and allowances made to attorneys and others in the action, for fees, ceased; that the treasury was kept intact and protected from such encroachments. Prior to the appointment of the State Trustees and appellant as its attorney as shown by the proceedings in the United States District Court on August

7 and 8, 1939 [Tr. thereof, p. 59, Vol. III of the record on appeal] such sums as the following had been withdrawn for fees and expenses:

J. W. Humphrey	$4,103.13
C. F. Humphrey	2,519.43
Attorneys Hubbard and Hogan	1,665.00
Letters to stockholders	2,093.00

Volume I of the record on appeal contains a letter dated August 27, 1938, written by attorney William H. Hubbard, attorney for plaintiff in Action No. 1646, the action in which the Trustees were appointed. In addressing Mr. Reimer, the accountant he states: "Trask's attitude is to pay no more attorney fees, but he can't get away with that with me." However, the Trustees did, and no more fees were paid to him, but the U. S. District Court took it upon itself to allow Hubbard and Hogan an additional $15,000 on his claim for services rendered in said action, where he represented the Humphrey group and brought nothing into the estate except litigation, represented parties who attempted to cancel the lease, discharge the Trustees and who connived with claimants to have executions levied against the corporations.

It was the duty of the appellant as attorney for the Trustees to prevent if possible the pilfering of the treasury. The record will bear out that withdrawals such as the above did not occur during the period of time that appellant represented the trustees. It may further be added that withdrawals on account of administrative expense during the period of State Trusteeship was kept down to a minimum and that excepting for granting the allowance for the taking of depositions, the interim allowance of $500 to appellant, and Trustees traveling expense, practically the only moneys paid out were the salaries of the Trustees in the amount of $5,850.

POINT II.

In Passing on the Right to Compensation, of Appellant as Attorney for Trustee in a Prior Proceeding, the Court Has Erroneously Failed to Apply the Law as Stated in Section 258 of the Bankruptcy Act Pertinent Thereto and Has in Error Applied Provisions of the Law Pertaining to Attorneys Acting in Different Capacities Than That of Appellant.

The refusal of the Court to make allowance to appellant as shown by the findings is that such services as were rendered were not of direct and substantial benefit to the estate, and places the attorney for the receiver in the same category as attorneys for individuals and committees who must affirmatively show the direct benefit accruing to the estate. In this the Court is in error. An attorney for a receiver in a prior proceeding acts in the capacity of representing the representative of the estate and an arm of the Court. His compensation is not dependent upon whether he succeeds in the prosecution or defense on behalf of the receiver, but rather on his effort and diligence in the performance of his duties. Section 258 of the Bankruptcy Act specifically provides for the payment of the reasonable costs and expense of the receivership, putting such expense and costs in the same class as that incurred by a trustee in bankruptcy.

Bankruptcy Act, Sec. 258.

This section (258 of the Bankruptcy Act) reads very similar to Section 241 of the Act providing for allowances to a referee, special master, trustee and his attorneys, attorney for the debtor and for petitioning creditors.

In error the Court applied Section 243 of the Bankruptcy Act as the basis on which to make its order on the

matter of allowance of fees to appellant, wherein the basis of allowance is whether the services contributed to the formation of a reorganization plan or were beneficial to the estate. Section 258 of the Act under which compensation is here claimed makes no such condition as a requirement for compensation. If the services under this section were the subject of a necessary expense of the receiver, they become the subject of compensation. In the instant case the Court did not say that the services rendered were not necessary in the proper performance of the duties of the receiver and the denial of allowance is made in disregard of such necessity. The question as to the right of an attorney for a receiver in a prior proceeding to compensation for services necessary in the performance of the duties of the receiver appears to never have been raised as a search of authorities does not reveal any case where the subject was under discussion. However, the following cited case takes the right of the receiver's attorney to compensation, as a matter of course, and does draw the distinction between such an attorney and one representing other parties who must show a direct benefit to the estate:

Matter of Memphis St. Railway, 11 Fed. Supp. 682.

"The receivers and the attorneys for the receivers are of course entitled to fee allowances to be determined by the Court because these gentlemen are acting as arms of the Court. The debtor corporation is also entitled to the benefit of counsel in its own interest. It is therefore proper for the Court to allow a fee to the debtor's attorney.

"Any other fee allowances are not required by the statute, Sec. 77B and are not in equity to be allowed by the Court out of the funds of the debtor corpora-

tion being administered in insolvency proceedings or in bankruptcy unless the service for which fee allowances are claimed were authorized by the Court before they were rendered, or are found by the Court to have been rendered by the claimants in an entirely disinterested manner for the benefit of the estate as an entirety."

In the following case too, the Court makes allowance to a receiver's attorney not on the basis of direct benefit to the estate but on the fact that the receiver required the assistance of counsel:

Cross v. Leverich Realty Corp, 41 F. 2d 797.

"Likewise since he (the receiver) required the assistance of counsel and since that item of expense was not included in administration expense, he should likewise be allowed a reasonable fee for counsel."

The case cited below, though not a proceeding in bankruptcy, in discussing the right of a receiver's attorney to compensation, places such right in the same category as that of the receiver:

United States v. Admiral Refining Co., 146 S. W. 2d 830, at 831, Texas.

"In Hickey v. Parrot Silver & Copper Co., 32 Mont. 143, 79 Pac. 698, 701, 101 Am. St. Rep. 510, applicable here it is stated: 'The considerations that should be controlling with the Court in fixing compensation are the value of the property in controversy, the practical benefits derived from the receiver's efforts and attention, the time, labor and skill needed or expended in the proper performance of the duties imposed and their value measured by the common business standards, and the degree of activity, in-

tegrity and dispatch with which the work of the receivership is conducted. 53 Corpus Juris 386, Sec. 629. The measures to be weighed in fixing attorney fees in receivership proceedings are to a large extent the same which are considered in fixing the receiver's fees. In fixing the allowances to either, the governing principle is that the compensation so allowed should be measured by the reasonable value of their services rendered. Pink v. State, Tex. Civ. App. 105 S. W. (2) 265, 271; 53 Corpus Juris p. 378, Sec. 641, P. 380, Sec. 617; 7 Corpus Juris Sec. Atty. and client, Sec. 191, pages 1080, 1081.' "

POINT III.

The Order of the Court Based on the Holding That Appellant Was Not Authorized to Appear in the United States District Court for the State Trustees, Was Not Supported by and Is Contrary to the Evidence, and Is Based on an Erroneous Premise of Law That an Attorney Must First Offer Proof to the Court That He Has Authority to Appear for His Client, That the Finding Upon Which Such Holding Is Based Is Inconsistent With Itself and With Other Findings.

The Court says in Finding XXVIII [App. p. 51]: "This Court has at no time determined the authority of applicant to appear as attorney in these proceedings as attorney for State Court Trustees." The fact that the Court entertains such appearance and recognizes him as such during the proceedings, assumes that he is rightfully in Court. An attorney appearing for a party in a proceeding is presumed to be rightfully in Court representing his client, unless the contrary is shown. Here there is no evidence to the contrary. The finding of the Court that

"The Court does not find 'that applicant was authorized to appear or represent the State Court Trustees in these proceedings' " is not a Finding at all. The language so states: "The Court *does not* find." It does not say "The Court finds that the 'Applicant was not authorized' or 'That applicant was authorized.' " It is left in the air the same as Finding XXV, later referred to. The Finding states "Applicant has not produced any documents or other indication of authority to act in these proceedings signed by State Court Trustees Udell & Logie. We do not understand the law to be that an attorney in Court is required to show written authority to appear, when not demanded of him, and why did not the Court so demand it if in doubt. Assuming for the purpose of the presentation here that the Finding means "Applicant was not authorized," such Finding is without any support. The Finding in paragraph XXVII negatives Finding XXVIII. It states that at the outset of these proceedings appellant appeared before the Court, filing an Answer for the State Court Trustees. Farther on, it states: "Appellant on January 26, 1940, filed a Notice of Appearance for State Court Trustees and that on March 26, 1942, Appellant filed a report of the State Court Trustees." The Court having at all times entertained the appellant before it as the attorney for the State Trustees and never having made any order or ruled to the Contrary, the same Court is not in position in its Findings to now assert that appellant did not represent or appear for the said Trustees. It is true as stated in the Findings that on November 17, 1939, appellant filed a motion for instruction to Buxton, one of the Trustees with respect to filing a closing report. The fact that that instruction was requested for Buxton to so file, is not any evidence that appellant was not attorney for the Trustees. Finding XXVIII is erroneous

and contrary to the evidence and contrary to the Court's own finding in stating that "In all matters applicant has sought to appear before this Court he has indicated only authorization by State Court Trustee Buxton." This is contrary to Finding XXVII [App. p. 50] stating that appearances were made for all the Trustees and that Notice of appearance was filed for all the Trustees.

An instruction to at attorney to appear for a trio of trustees need not necessarily be given by each trustee and an attorney is entitled to proceed on instruction of one unless he has knowledge that it is contrary to the wishes of the other trustees.

We may further add that the record shows that on June 10, 1942 [Vol. III of Record, Tr. of proceedings], when appellant was before the Court on motion for leave to file a Final Account, Mr. Udell, one of the other Trustees was present and took part in the proceeding and that no contention was made by Mr. Udell that petitioner did not represent the Trustees in Court.

To support our contention that an attorney in Court is presumed to represent his client unless the Court determine the contrary, we refer to the following authorities:

United States v. Insurance Co. of North Amer., 173 F. 2d 53, at 56:

> "It is true that ordinarily there is a presumption that an attorney at law who appears in regular manner on behalf of a party litigant has authority to do so and one who would successfully challenge his authority must present substantial proof that the authority is lacking."

Feldman v. Commercial General Life, 78 F. 2d 838, at 840:

> "An appearance by a practicing attorney creates a presumption that he has authority to act and the law casts the burden of proving the contrary upon the one asserting it."

Booth v. Fletcher, 106 F. 2d 676, at 683:

> "Even in such a case, however, the presumption is that an attorney at law who appears in a regular manner on behalf of a litigant has authority to do so and one who would successfully challenge his authority must present substantial evidence that authority is lacking in order to strike a pleading from the files. While it is true in such a case the Court has power to require an attorney, one of its officers, to show his authority to appear, this is not an arbitrary power which permits the Court completely to disregard the presumption of authority previously stated."

6 Corpus Juris, p. 633:

> "In other words, the authority assumed by an attorney at law to act for a party in Court is valid until disproved, not void until proved."

6 Corpus Juris, p. 635:

> "The authority of any attorney to represent his alleged client cannot ordinarily be questioned at the trial or in an Appellate Court."

7 Corpus Juris Sec., p. 875:

> "There is a presumption that an attorney at law as an officer of the Court in general is duly authorized to act for a client whom he professes to."

7 Corpus Juris Sec., p. 876:

> "Thus there is a presumption that an attorney who appears for a party in an action or litigation has authority to do so unless the contrary is shown."

POINT IV.

That the Order Disallowing Fees to Appellant Is Arbitrary, Inadequate, Not Supported by and Contrary to the Evidence, and Is Not Based or Measured by the Same or Any Standard Comparable to That on Which Allowances and Orders for Fees, Were Made on Petitions of Other Attorneys.

Though the Humphrey group of attorneys representing the plaintiff in Action No. 1646 in the State Court were in no wise appearing as attorneys for any officer of the Court and were merely attorneys for litigants in a civil action, and which services brought nothing into the corporations or into the estate in the said State Court proceeding, on claims filed by them in this Court, based on services performed in the State Court proceeding, as attorneys for one of the litigants, and in addition to the allowances previously made by the State Court to said attorneys, before the appointment of the State Trustees, the United States District Court allowed this group of attorneys representing the plaintiff in said Action No. 1646, approximately $18,000 as follows:

William H. Hubbard and James Hogan, who appeared jointly for the Humphrey group, and of record for the plaintiff in Action No. 1646 in the State Court, and who recovered nothing for the estate, were given separate allowances on their claims by the Court in this proceeding, to wit:

William H. Hubbard	$11,000.00
James Hogan	4,375.00

After William H. Hubbard withdrew as attorney and William Mead was associated as counsel for the Humphrey group during the latter part of the proceeding and who recovered nothing for the estate, was allowed by the Court in this proceeding $2,500.00 on his claim for services in the State Court, while Messrs. Redwine and Redwine, one of whom was a member of the legislature, whose only services were being substituted as attorneys for the Humphrey group and obtaining continuance of the action by using his prerogative as an assemblyman engaged in a session of the legislature and noticing the taking of a deposition, which was never taken, was allowed $350.00. A. G. Edwards, who also was of the Humphrey group, was allowed $900.00.

On behalf of the defendant in the said action in the State Court, C. C. Kempley filed his claim for $7,323.18, and in addition to the $1,000.00 previously allowed to him by the State Court before the inception of this proceeding, compromised his claim for additional fees in the amount of $4,150.00 and the same was allowed by the Court in this proceeding [Finding LXXI; App. p. 68]. The standards for measuring compensation by the Court in allowing fees to attorneys in the State Court proceeding, changed with the petition of appellant, though the other atorneys were only representing parties to the action while appellant was working and cooperating with the Court trustees for a period of a year in preserving the rights and interests of the corporations.

May we further inquire by what standards the services of Mr. Braucht, an attorney from the adjoining county to Mariposa, who took no active part in resisting the mo-

tion to dismiss the action [Rep. Tr. p. 38, lines 6 to 12] were determined to be of "Direct benefit to the estate" and the subject of compensation, while the services of appellant, who was the regular attorney for the State Trustees who had never been discharged as such and were the persons to whom the charge and control of the estate would revert to, should the Chapter X proceedings for some reason be dismissed, were not of "Direct benefit to the estate," though he had spent several days in preparing for the resistance to the motion and was required to travel 350 miles each way to appear in Court.

By what standards were the services of appellant in preparing the material upon which an action for accounting against Humphrey and upon which action was later brought by an independent stockholder of "No direct benefit to the estate," and the services of the attorney who proceeded with the action and failed to recover of "Direct benefit to the estate" and the subject of compensation [Finding LXXIIb, c, and LXIIId, App. pp. 69 and 71].

By what standards were the services of appellant not the subject of compensation, in compromising numerous undisputed claims of creditors in a saving of approximately $2,000, and the services of attorneys in compromising a disputed claim of A. G. Ilseng in the amount of $6,500, subject to compensation in the sum of $4,000 [Finding CXII to CXVI, App. pp. 85 and 86].

When the disallowance of fees to petitioner, who acted as attorney for State Trustees, is compared to allowances

made to the attorneys for the Trustee in this proceeding, there is no possible relationship of the standard or basis on which the same was ordered. It is true that the proceeding in the United States District Court continued for a period of ten years, while the State Trusteeship was for over a period of only one year. However, the fact that the proceedings were drawn out over a ten year period when the same should have been disposed of in the ordinary course within the period of less than a year is no recommendation for allowance of fees upon the length of time the matter was pending. We take leave to point out allowances made to Trustees' attorneys and others in this proceeding.

One of the attorneys for the Trustee herein is James T. Boyd, who, during the pendency of this proceeding, had been allowed $16,875.00, and after final hearing, was allowed an additional $7,500.00, making a total payment to him of the sum of $24,375.00 [Finding LXXXVIII, App. p. 78].

Finding XVI [App. p. 46] shows wherein John P. Thatcher, as one of the attorneys for Trustee, had been paid $4,250.

Findings CXII to CXVI, inclusive, cover services above referred to, rendered by attorneys Griswold, Vargas & Stewart. Allowance was made to them in the sum of $4,000.00 for attorneys fees [Findings CXII to CXVI, App. pp. 85 and 86]. This covered representation in only one matter, and that was with reference to the claim of

A. G. Ilsing, which was finally compromised in the amount of $6500.00.

Finding LXXV [App. p. 72] re C. C. Kempley, who had already been allowed substantial fees by this Court on his claim for services as attorney in the State Court proceedings, was allowed by this Court for fees in this proceeding, an additional sum of $12,000.

We submit that the order of the Court disallowing any fees to appellant in view of the services rendered by him, cannot in any degree whatsoever be considered as a determination by the same standards applied in allowance to others, and that the sum of $500 which had previously been paid to appellant which the Court's finding states to be for the hearing of Oct. 3, 1938, disregards all other services.

In measuring the services rendered by appellant in comparison to services performed by other attorneys to whom fees have been allowed, we respectfully call attention to the fact that the petition for Reorganization under Chapter X filed herein [Vol. I of the Record] shows that at the time management was taken over from the State Trustees, the assets of debtor corporations in equipment, cash and credits was in excess of $100,000 of which approximately half was cash, bullion and credits and that liabilities were then approximately half that amount. At the present time after ten years management with the aid of other petitioners for fees, the corporations are insolvent and in bankruptcy.

As has been previously pointed out, in addition to the many proceedings in Court, though the trustees were directly in charge of the affairs of the corporations, the appellant took charge through his office of most of the routine work, they having no other office. Where in this instance the trustees were allowed and received approximately $5800 [App. p. 18] for their services, the allowances requested by appellant are very nominal when it is remembered that in additon to rendering services he supplied the office facilities for the trustees work as well as his own.

45 Amer. Juris. 223, Sec. 288.

"It has been said that the measure of a reasonable fee is by analogy the amount the law allows other officers for the performance of similar duties. . . . (p. 224)—The considerations which should control in fixing compensation are the value of the property involved in controversy, the particular benefit derived from the receiver's attention; time, labor and skill required, and experience in the proper performance of the duties imposed, their fair value measured by common business standards, and the degree of integrity and dispatch with which the work of the receiver is conducted."

Rose v. Standard Trailer, 33 Atl. 2d 504.(Penna.) (to same effect as above).

Veeder v. Public Service Holding, 51 Atl. 2d 321—(Del.) (in this action the Court allowed $6000 to the receiver and $22,500 to the attorney for receiver by reason of litigation involved).

POINT V.

The Findings of the Court Are Inconsistent, Speculative and Indefinite.

The term used by the Court in Findings XXV and XVIII, "The Court does not find" does not denote a finding but rather a lack of it. A search for authorities does not reveal any instance of interpretation of such language in a finding. However, such language indicates a failure to determine rather than a determination that a fact does not exist. Similarly, for one to say "I do not contend" or "I do not say" that a certain fact or condition exists is not stating that the fact or condition does not in fact actually exist. It is a non-commitment. The term is frequently used in argument where without admitting that certain conditions do not exist the declarer proceeds with argument after refusing to make commitment on a premise. It is not difficult for a Court to state in its findings either that "The Court finds that . . is a fact" or "That . . . is not true" or "Is not a fact." If findings have any purpose at all it is to clearly and succinctly state what allegations are true and what are untrue. This the Trial Court has here failed to do.

Finding XXIII [App. p. 49] states that the sums of $300 and $200 were allowed as interim compensation in the State Court proceeding. In Finding XXV it appears that such compensation was for only the Hearing of Oct. 3, 1938, which negates the Finding XXIII that the allowance was an interim allowance.

Finding XXVIII [App. p. 51] states that the Court has at no time determined the authority of appellant to appear in the United States Court for the State Trustees. In the same finding the Court states that "The Court does

not find that applicant was authorized to appear or represent the State Trustees in these proceedings." In view of the law as cited hereunder these findings are inconsistent.

The Findings as a whole are indefinite and appear to be an evasion to find the facts in order to support an Order denying compensation. They fail to meet the issues squarely; the reluctance of the Court to state definitely any matters in the findings which are favorable to appellant is quite apparent.

Nason v. Shinjo, 237 Pac. 557 at 559.

> "In other words and briefly both by the pleadings and the evidence, an issue as to the ownership of said mechanical appliances was submitted to the Court for decision and a clear and unequivocal and direct finding upon that issue should have been made. The only reference to be found in the findings to that issue are the following: 'It is not true that the plaintiff wrongfully and unlawfully removed from said premises or removed at all any machinery, fixture, appliances, or anything else from said garage that it did not have a legal right to.'
>
> The foregoing is rather a conclusion of law than a finding of fact, but treating it as an attempt to find upon the question whether the parties intended the fixtures to become a permanent part of the building, it wholly fails to reach the mark."

Cleaning and Pressing Co. v. Hollywood Laundry, 217 Cal. 131 at 137:

> "Although it is true that findings must be liberally construed to support the judgment if possible, it is equally true that where there are contradictory,

irreconcilable findings about matters material to a proper disposition of the case, the Appellate Court can do nothing but reverse the case." (Citing many authorities.)

Horowitz v. N. Y. Life Ins. Co., 80 F. 2d 295:

"The District Court . . . makes no findings upon the question whether insured knew the nature of the disease causing total disablement of the insured prior to applying for disability insurance. The parties were entitled to a finding upon this issue and the failure to do so . . . requires reversal of that portion of the decree deciding it against appellant."

POINT VI.

The Findings of Fact Are Not Supported by the Evidence.

Finding XXV [App. p. 49] states: "The Court does not find that applicant was employed by the trustees prior to the second day of September, 1938." This is in direct conflict to the undisputed evidence. Petition of appellant [App. p. 6] stating that within a few weeks after the appointment of the trustees (May 9th, 1938) Mr. Trask and Mr. Buxton were at the office of appellant and engaged him as their attorney. [Tr. of testimony, p. 4, line 19, to p. 5, line 12, Vol. II of the record on appeal.] This testimony is corroborated by letter of Judge Trabucco dated May 25, 1938 [Ex. 2, App. p. 33] which discusses allowance of fees.

The conclusion of the Court in Finding XXV that the services rendered were of no direct benefit for which compensation should be allowed is contrary to the evidence as pointed out under Point I.

Finding XXVI which is in fact a conclusion [App. p. 50] holding that the $500 heretofore paid is a fair allowance, is contrary to the evidence as shown under Point IV.

Finding XXVIII is not supported by the evidence as shown under Point III.

Finding XXIX is not supported by the evidence as shown under Point I.

Finding XXX is a conclusion rather than a finding. Such conclusion and order based thereon is contrary to the evidence, it appearing from the undisputed evidence that services were performed as attorney for the trustees necessary in the preservation of the estates.

Conclusion.

In reviewing the evidence as above set out, we respectfully again call to the attention of the Court the stipulation entered into at the time of hearing on appellant's and others' petitions, to wit: that all the matters set out in the petition are accepted as if having been testified to and as evidence [Rep. Tr. p. 13, lines 8 to 11, Vol. II of Record] and that there was no conflicting evidence offered or submitted.

The order of the Court disallowing compensation to petitioner must necessarily fail to take into account actual out-of-pocket money which petitioner has expended in maintaining office facilities for the trustees for a period of a year, and his expense in employing an attorney in his office to assist him in other work, so that he might devote the necessary time to the affairs of the trusteeship. [App. p. 7.] By the Order of the Court, the petitioner is not only not compensated for the time and services that

he has rendered, but is out in actual cash outlayed by him in performing his services to the trustees and the corporations.

The record is clear and unrefuted that appellant has devoted a year's service to the State Court Trustees, that he was alert in his duties in protecting the estate from encroachment and jeopardy, that he has prepared and defended numerous proceedings in connection with his duties and has appeared in Court that took him 350 miles from his office on many occasions, as attorney for the Trustees, and if the finding of the Court is correct that the $500 received by appellant was as compensation for service only on the proceeding heard in Court on October 3, 1938, then these services have never been compensated for. The Court denies compensation based on its conclusion that the services rendered no direct benefit to the estate. As pointed out above, such conclusion can be arrived at only by the most arbitrary determination. Each proceeding enumerated above and each item of service, was for the purpose of, and did, preserve the estate. The theory upon which such conclusion is made is erroneous as a matter of law, the Court having placed the services of an attorney for a receiver in a superseded proceeding in the same category as attorneys representing interests of individuals and private committees; the Court has made its order denying compensation to appellant, based on different and not comparable standards as applied to other petitioners for fees; as a premise on which to deny compensation to appellant for services rendered during the bankruptcy proceeding, the Court makes the conclusion that appellant did not represent the Trustees during the bankruptcy proceedings, contrary to its own finding in

the same paragraph that appellant appeared for said trustees, and without any finding that the Court at any time determined that appellant was not the attorney for the Trustees.

To support the objective of denying compensation to appellant, the Court has in instances failed to make findings, and made inconsistent, indefinite and evasive findings. A reading of the evidence in this matter, the petition of appellant, the transcript of his testimony, and the findings on appellant's petition and the Order made on his petition, and the generous allowances to other petitioners without question as to the direct benefit to the estate, makes it difficult for one to conclude that the Order of the Court was the result of a desire to regard the petition of appellant on the same basis of merit as other petitions filed rather than the result of a preconceived determination to deny any allowance. Those who appear before a Court of Justice should be dealt with with an even hand, weighed in the same scales; there should be no favorites and none in disfavor except as their cause merits.

Respectfully submitted,

CHAS. I. ROSIN,

Attorney for Appellant.